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October 27, 2006

PETITION TO THE STATE WATER RESOURCES CONTROL BOARD

Jesse Noell, Stephanie Bennett, Kristi Wrigley, Elk
River Residents Association,

Petitioners,

In the Matter Re: In the Matter Re: Petition for appeal and immediate stay of action by California Regional Water Quality Control Board – North Coast Region, on September 29th, 2006, regarding approval of Monitoring and Reporting Program, Order R1-2006-0103, and enrollment of THPs 1-03-126, 1-04-241 and 1-05-161 under Watershed-wide Waste Discharge Requirements, Order R1-2006-0041, for Pacific Lumber Company timber operations in Freshwater Creek and Elk River watersheds, Humboldt County.

**PETITION FOR
APPEAL AND
IMMEDIATE STAY OF
MONITORING AND
REPORTING, ORDER
R1-2006-0103 AND
SUBSEQUENT THP
ENROLLMENTS
(THPs 1-03-126, 1-04-
241 and 1-05-161)**

Summary

The above named hereby petition for appeal and immediate stay of an improper action by the Executive Officer of the North Coast Regional Water Quality Control Board (NCRWQCB) to approve a Monitoring and Reporting Program (MRP) for Pacific Lumber Company timber operations in the Freshwater Creek and Elk River watersheds in Humboldt County, Order R1-2006-0103, and the subsequent enrollment of THPs 1-03-126 and 1-04-241 (Freshwater Creek), and THP 1-05-161 (Elk River), and/or any other THPs, into that MRP under Watershed-wide Waste Discharge Requirements, Orders R1-2006-0041 and R1-2006-0039.

Approval of this MRP violates the receiving water limitations adopted by the watershed-wide WDRs, violates the narrative objectives and prohibitions of the North Coast Basin Plan, violates Water Code sections 13240, 13241, 13263, violates both the letter and intent of the Board's May 8th, 2006 motion, does not comply with the Board's stated requirement to adopt a zero sediment discharge level for activities beyond 125% of background, will result in a significant increase in sediment delivery and flood flow increase and increase the rate of sediment transport to the

nuisance reaches in Elk River and Freshwater Creek, obstructs the stream channel, subjects downstream landowners to further harm, and was done without due process participation from affected residents.

Enrolled Timber Harvest Plan Activities subject Petitioners to immediate irreparable harm. The Above named Petitioners are therefore petitioning the State Water Board for an immediate emergency stay and review of the Executive Officer's improper action.

Above named Petitioners have filed this petition in a timely manner, and in accordance with the rules set forth in Section 13320 of the California Water Code and Title 23 of the California Code of Regulations, Section 2050, so as to preserve our legal rights and to ensure a fair hearing

(1) Name, address, telephone number and email address of the petitioners:

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(2) The specific action or inaction of the regional board which the state board is requested to review and a copy of any order or resolution of the regional board which is referred to in the petition:

Petitioner specifically requests an immediate stay and review of action by the Executive Officer of the North Coast Regional Water Quality Control Board on September 29th, 2006, to approve a Monitoring and Reporting Program, Order R1-2006-0103, and subsequent enrollment of THPs 1-03-126, 1-04-241 and 1-05-161, and/or any other THPs under Watershed-wide Waste Discharge Requirements, orders R1-2006-0041 and R1-2006-0039, for Pacific Lumber Company timber operations in Freshwater Creek and Elk River watersheds, Humboldt County.

(3) The date on which the regional board acted or refused to act or on which the regional board was requested to act:

Monitoring and Reporting Program order R1-2006-0103 was approved by the Executive Officer of the North Coast Regional Water Quality Control Board on September 29th, 2006. THP 1-03-126 was enrolled under that MRP on the same date. THP 1-05-161 was enrolled under the MRP on October 13th, and THP 1-04-241 was enrolled on October 17th. Refusal to act to uphold and enforce the law and protect water quality and health and safety is an ongoing pattern and practice of the Water Board and Executive Officer.

(4) A full and complete statement of the reasons the action or failure to act was inappropriate or improper.

- The MRP and enrollments increase ten-event-per-year-recurrent-flood-height by increasing peak flow runoff, sediment discharge, and sediment transport rates such that minimum depth to groundwater below leaching trench standards for existing permitted septic systems in Elk River, particularly the South Fork of Elk River will be exceeded as many as 30 days or more per year. While the Peak Flow Model (attachment B to the WDR at pg. 21) shows that nuisance flooding blocks access on the South Fork Elk River at 1,338 cfs ; evidence attached herein shows that nuisance now occurs violating of Basin Plan Septic standards at 400-500cfs at the Farmhouse on the South Fork Elk River. Many other septic systems on the Mainstem Elk and North Fork are similarly situated. This permits a public health hazard for water intakes downstream and raises constitutional deprivation issues by privileging a third party to extinguish vested property rights; all of the above violate the Basin Plan and other applicable law. (See Figure 4-1 on page 4-11.00 of the North Coast Regional Water Quality Control Plan updated September 13, 2006.)(See graph of flood heights, Excel spreadsheet of Farmhouse submitted to the administrative record for the Stay Hearing on or about April 15, 2005,)(See Discharge rating curve for South Fork Elk River at Farmhouse bridge for hydrological year 2005 and 2006.)
- In the North Fork Elk River, the MRP and THP enrollments give rise to dramatically higher sediment delivery levels to the extent that high hazard landslide areas are harvested under the Landslide Model and the remainder of the Peak Flow allotment is filled using the so called zero discharge level under the MRP and enrollments. Here too, the rate of over-utilization of the assimilation capacity of the North Fork is certain.
- The Regional Board's continuing refusal to investigate the nuisance conditions and impacts identified above and to prevent nuisance as required by law constitutes a pattern and practice of harassment, oppression and discrimination against certain property owners and residents under the color of law. The resulting government authorized coercion type invasion of residents' property is both physical, functional, and temporal.
- The MRP and enrollments violate the 40 CFR Section 131.6 and 40 CFR Section 131.12(a)(1)anti degradation policy in that existing in-stream uses will not be maintained. To the extent that Petitioners are successful in pursuing Federal suit under the Ex Parte Young doctrine, punitive damages may be sought against the State Defendants in their individual capacities for their alleged unconstitutional takings. It is inappropriate for the State Board to facilitate such violations. See Swartz v. Beach, 229 F. Supp. 2d 1239.
- The Executive Officer has authority to take actions which substantially advance legitimate public interests; this action which will create additional nuisance flood effects and health hazard advances no such public interests.
- The MRP and THP enrollments create conditions that single out residents for selective down-zoning and/or subject residents to clean up and abatement enforcement actions when existing permitted septic systems are placed under MRP enrollment induced floodwaters. This is a violation of residents' constitutional right to equal protection under the law: no other property owners other than those affected in Elk River and Freshwater have been subjected to flooding, impairment of domestic supply, denial of access, actions that extinguish rights to existing septic system function, property damage for the next 20-50 or more years when the damage could be corrected within 3-6 years, denial of fire and medical and police services---all due to approval of permits that benefit one very special neighbor.
- To the extent that the State Water Board determines that the assimilation capacity of the at issue receiving waters were properly determined and fully allocated in the approved WDRs in accordance with Section 13263, the increased sediment discharge permitted by the MRP and THP enrollments into to waters of the state over-allocate utilization of the assimilation capacity of the receiving waters for sediment wastes. Petitioners previous contentions regarding the WDR are that the assimilation capacity was not determined by the WDR and that it was over-allocated and that the state is strictly liable for damages from planning and permitting the water of the state to transport sediment waste in amounts that result or have resulted in obstruction of the channel. To the extent that assimilation capacity has been exceeded by the MRP and enrollments the Basin Plan objectives and prohibitions are violated by the MRP and enrollments and the Executive Officer's actions violate Section 13247. Furthermore, the Executive Officer is in

violation of 13247 for not indicating in writing her authority for not complying with the Basin Plan and Section 13263.

- The potential impacts from the MRP THP enrollment activities exceed the bounds of the negative declaration for the WDR and were not reasonably anticipated in the disclosure sent to the state CEQA clearinghouse.
- The flood-water-backup effects to the North Fork and Mainstem Elk River resulting from increased discharges of water and sediment into the South Fork Elk River as a consequence of the MRP enrollments were not evaluated in the MRP or WDR. MRP enrollment induced discharge of increased water and increased sediment increases flood height sufficiently to extinguish septic function on the South Fork Elk and create an imminent health hazard.
- The actions violate the objectives and prohibitions of the Basin Plan to the extent that discharges exceed assimilation capacity. Discharges are in amounts deleterious, discharges are in amounts that result in concentrations of settleable solids that result in deposition of material that causes nuisance or adversely affects beneficial uses, discharges are in amounts that alter the suspended sediment load and suspended sediment discharge rate of surface waters in a manner that cause nuisance.
- The actions and inactions permit discharges that add to the obstruction of the channel of the nuisance flood reaches.
- The actions and inactions permit discharges that impede recovery of the nuisance flood reaches.
- The action and inactions violate Section IV A. because the MRP and THP enrollments increase discharge of runoff that results in increased bank erosion and bank mass wasting and channel scour and increase the transport rate of the sediment generated to the nuisance flood reaches above levels that inhibit recovery from existing conditions of nuisance flooding and pollution.
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they alter the manner in which receiving water limitations are keyed to the discharge of sediment from Timber Harvest Plan Activities.
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they fail to document, map, photograph the site conditions sufficiently to identify small and medium sized landslides. What resolution is adequate to identify a landslide that measures 2'x2'x2' or 8 cubic feet or 1/3 cubic yard?
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they don't identify what erosion occurred following the past harvest and road construction or maintenance.
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they place an unknown amount of reliance on Lidar, slope steepness, landslide mapping from geology reports, shalstab modeling using unknown parameters and very little on detailed pre-harvest mapping.
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they don't identify what areas outside the plan could be affected by the Timber Harvest Plan Activities or monitor those areas. Channels are not mapped in detail sufficient to determine whether unharvested channel upstream unravel at a slower rate than the harvested channels.
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they don't say what sized area will be monitored or what mapped area will be monitored.
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they don't say that monitoring will occur for the entire 15 year period during which landsliding can be expected to result from root strength loss and increased effective rainfall.
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they don't provide for waterboard staff funding, thus staff will be diverted from other tasks.
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they don't provide for quick action to prevent harm when landslide or erosion occurs. When a landslide or erosion occurs, how can there be prevention if there is no plan for quick remediation?
- The MRP and THP enrollment actions are inappropriate and/or improper and/or invalid because they permit Class III protective prescriptions that are weaker than the Forest Practice Rules for watercourses that are threatened and impaired.

- The action and inactions violate constitutionally protected due process rights and vested rights of downstream residents who are damaged by sediments discharged under permit into the “waters of the state” in amounts deleterious or that cause nuisance on residents properties.
- Taken together, the WDR which privileges the discharge of sediment and peak flow in amounts deleterious under permit into the waters of the state for the next 20 or more years, and the MRP and THP enrollments privilege unquantified and unidentified additional amounts of deleterious discharge that violate CEQA and the Basin Plan and the Clean Water Act.
- The changes to the WDR effected by the MRP and THP enrollments were not reasonably anticipated by water quality staff or identifiable at the time the CEQA documents were submitted to the clearinghouse for CEQA compliance review or at the time of review for compliance with the APA.
- This permit amounts to a complete reinterpretation of the scientific and administrative record for these watersheds, and yet reduces it down to an administrative action without Board or CEQA review.

Approval of this MRP and THP enrollments violates the North Coast Regional Water Board’s May 8th, 2006 motion and its findings.

The Elk River WAA indicates that 68 percent of sediment delivery is attributable to anthropogenic delivery from sources other than harvest related landsliding. This is sediment delivery that is uncontrolled by the MRP yet increases sedimentation in the nuisance flood reaches. To the extent that harvest in the South Fork of Elk is increased under the MRP enrollments to 334 c.c. equivalent acres per years sediment delivery will be increased by approximately 136% even if there are no landslides.

Thus, the allowance of any timber harvest beyond those in the original WWDR approvals, without a plan to positively prevent the generation of sediment from non-landslide sources will ultimately guarantee that the 125% limit will be exceeded. Furthermore, the 125% limit is arbitrary and capricious in that the sediment transport rate through the nuisance flood reaches has been reduced as a function of reduced conveyance capacity. Therefore to the extent that assimilation capacity was determined in the WDR it is over-allocated, and in effect the WDR and MRP and THP enrollments are government authorized dumping of wastes onto residents property.

(5) The manner in which the petitioner is aggrieved.

Past history, the administrative record, and repeated scientific analyses have all established that PL’s excessive rate of harvest in these watersheds has been responsible for greatly increased flooding, which has caused extensive property damage and threatened public health and safety. It has been established as fact that the past and current rates of harvest in these watersheds contribute sediment delivery to the watercourses, which then settles out in the lower reaches. It has been further established that this sediment delivery due to timber harvesting has reduced the channel conveyance capacity in Elk River by over 60%¹, meaning that the channel is no longer capable of conveying the amount of water that it once did. This forces typical storm flows out of the stream channel, invading the private property of residents. Septic systems fail to work at flood flows considerably smaller than the nuisance level flood level that denies access. For instance, while access is denied at Dead Woman’s Corner at 13.7 feet of stage; Kallo’s septic system may begin to fail at flood stage of 10-12 feet. On the South Fork Elk septic systems begin to fail at about 11 feet of stage. The MRP and THP enrollments will dramatically increase the discharge of sediment and water into the nuisance flood reaches of both the South Fork, North Fork and Main Stem Elk River. Flooding will be exasperated in the North Fork by backwater effects in the South Fork. The Regional Board has failed to provide potable domestic supply for many residents,

¹ See Preliminary Flood Assessment of Lower Elk River, Rose Patenaude, P.E, NCRWQCB

including those whose water supply intakes are downstream of septic systems that are flooded as many as 10 times per year. As a continuing result of Regional Board and staff inactions and actions such as the MRP and THP enrollments, vested riparian rights have been extinguished, as has access, septic system function, and the ability to grow crops, and property is damaged and lives and health and safety threatened.

This invasion of private property has caused, and continues to cause, damage to homes, foundations, driveways, fences, septic systems, wells, furniture, vehicles, livestock, etc. It has also forced hundreds of residents to be held against their will by floodwaters which prohibit them from entering or exiting their property, keeping families apart for days at a time, or forcing them to assume great personal risks to their health and safety in crossing floodwaters.

It has been well established as fact that PL's practices have harmed the residents of these watersheds. It has also been well established as fact that the Forest Practice Rules, PL's HCP, and other regulatory measures currently being used, including the WDR on its face are all inadequate to protect these residents from further harm. Many residents in Elk River still have no potable domestic supply of water, 9 years after the Regional Board ordered PL to investigate and provide such domestic supply. Therefore, the Board's direction, and the Executive Officer's action pursuant to that motion, to permit continued operations under those same inadequate regulatory measures will do direct harm to the residents of these watersheds, whose interests the Petitioners represent.

(6) The specific action by the state or regional board which petitioner requests:

Stay the MRP and THP enrollment actions of the Executive Officer and invalidate the MRP and THP enrollments (actions).

(7) A statement of points and authorities in support of legal issues raised in the petition, including citations to documents or the transcript of the regional board hearing:

The points and authorities to support the legal issues raised herein have all been discussed in detail under Section 4, above. Documents and transcripts referenced have all been footnoted. Applicable code sections which are violated by the actions of the Board and the EO include, but are not limited to:

- Government Code Section 65040.12
- Public Resources Code Section 72000
- Water Quality Control Plan For The North Coast Region (Basin Plan), June 28, 2001
- Multiple sections of the Porter-Cologne Clean Water Act, including, but not limited to Sections 13050(m), 13301, 13304, 13308, 13350, 13351, 13376, 13377, 13381, 13382, 13384, 13387
- Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.)
- SWRCB Water Quality Enforcement Policy, February 19, 2002

Section 13350(m) of the Porter-Cologne Clean Water Act defines nuisance as anything which meets all of the following requirements:

1. Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
2. Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.
3. Occurs during, or as a result of, the treatment or disposal of wastes.

The Supreme Court has determined that government action which results in a permanent physical occupation of private property is invariably a taking and is not subject to a balancing process. (*Loretto v. Teleprompter Manhattan CATV Corp.*, supra, 458 U.S. at p. 432 [73 L.Ed.2d at p. 880].) The court declined to draw a distinction between a physical invasion by the government, versus an invasion by a third party authorized by the government. (at p. 432, fn. 9 [73 L.Ed.2d at p. 880].) "*The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.*" (*Yee v. City of Escondido, Cal.*, supra, 503 U.S. at p. 118 L.Ed.2d at p. 164, 112 S.Ct. at p. 1528)

Additionally, the State Water Board should be aware that significant liabilities have been incurred for contractual agreements that are based upon historic flood frequency, flood stage and flood zoning that are interfered with by these agency actions. See *Associated California Loggers, INC v. Kindler* (1978) 79 Cal. App. 3d 34 citing *Barlow v. Collins*, 397 U.S. 159.

Swartz v. Beach, 229 F. Supp. 2d 1239

(8) A statement that the petition has been sent to the appropriate regional board and to the discharger, if not the petitioner:

This petition has been sent concurrently to the following persons via E-Mail:

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(9) A statement that the substantive issues or objections raised in the petition were raised before the regional board, or an explanation of why the petitioner was not required or was unable to raise these substantive issues or objections before the regional board.

The substantive issues raised in this petition had been raised both verbally and in correspondence with the Executive Officer. A workshop was held to discuss issues. Resolution was offered but refused by the Executive Officer. No opportunity was provided for public comment. Petitioners filed a petition raising issues stemming from the WDRs adopted by the Regional Board on May 8th, 2006 and will proceed on that Petition following an opportunity to review the complete administrative record and Public Records Act request.

In addition to issues raised at that meeting, significant points regarding the ongoing issues central to this petition have been repeatedly raised before the Regional Water Board over the last seven years on occasions too numerous to count. The Petitioners ask that all reports, letters, transcripts, studies, and other documents which the State and/or Regional Water Boards already have in their possession relative to Petitioner's previous petition (SWRCB/OCC FILE) be admitted to the record. Specific citations will be provided in future filings.

Conclusion

Petitioners, watershed residents, and the public interest will be substantially and irreparably harmed by the implementation of the Executive Officer's action, while dischargers will not suffer from a stay. Thus, the balance of harms at issue in the Petition heavily favors the granting of a stay. In addition, the motion has raised substantial questions of law, which, upon review in accordance the California Water Code and the California Environmental Quality Act, are highly likely to be resolved in favor of the Petitioners. Therefore, the State Board should issue a stay of any action taken pursuant to the Executive Officer's action of September 29th, 2006.

The State Water Resources Control Board has no acceptable recourse other than to immediately stay the actions taken by the Regional Board's Executive Officer on September, 2006, and to rescind the zero sediment discharge level motion passed by the Regional Board on May 8th, 2006. To not do so would directly harm the health, safety, and property of the residents of these watersheds, whose interests the Petitioners represent.

The State Board's Denial of this Petition for a stay, and its tacit approval of both the Regional Board's motion and its implementation through the Executive Officer's action, will result in harm to residents, the environment, and other timber land owners, as well as to the State and Regional Boards and the public trust. Such denial:

1. will irreparably harm residents, Petitioners, and the environment by willfully allowing the continuation of practices which are well known to be responsible for past and continuing damage to health, safety, property, and the environment, and;
2. will signify tacit approval of this weak regulatory program to other Regional Boards across the state, thus encouraging the continued non-regulation of logging-related discharges and acceptance of the resultant threats to health, safety and property, and;

3. will subject the State and Regional Boards to legal action for discrimination, takings losses, and conspiracy charges related to the granting of unfair business advantage, and;
4. will present a dangerous precedent that directly harms the public trust.

The Executive Officers's action is contrary to the public interest, and the Petitioners respectfully requests that the State Board immediately stay the implementation of this action, rescind the Board's motion which gave rise to the action, and fully review both the Regional Board's impropriety in passing the motion, and the Staff's impropriety in enrolling THP's into the WDR pursuant to the Board's motion.

I hereby declare that the foregoing is true and correct to the best of my knowledge.

DATED: October 30, 2006, in Eureka, California.

Respectfully submitted,

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Elk River Residents Association